Supreme Court, U. S.
FILED
MAR 14 1979
MICHAEL RODAK, JR., CLERK

# In the
# Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1408

EMMETT RAYMOND PROCELL
Defendant-Petitioner

versus

STATE OF LOUISIANA
Plaintiff

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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OCTOBER TERM, 1978

NO.

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Defendant-Petitioner

versus

STATE OF LOUISIANA
Plaintiff

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Emmett Raymond Procell, your petitioner, prays that a writ of certiorari issue to review the judgment and the decision of the Supreme Court of the State of Louisiana which affirmed a conviction of your petitioner of the offense of first degree murder in the Eleventh Judicial District Court, Sabine Parish, Louisiana.

## OPINIONS BELOW

SUPREME COURT OF LOUISIANA. The opinion of the Supreme Court of Louisiana bears the style and caption as follows: State of Louisiana v. Emmett Raymond Procell, 365 So.2d 484 (La. 1978). A copy of the opinion is appended to this petition and made part hereof. (See Appendix A, the majority opinion, and Appendix B, the dissenting opinion).

ELEVENTH JUDICIAL DISTRICT COURT, SABINE PARISH, LOUISIANA. The trial judge's "Per Curiam Comments to Assignment of Errors" is appended to this petition and made part hereof. (See Appendix C).

## JURISDICTION

The judgment and the opinion of the Court below was entered on November 13, 1978. Rehearing was denied on December 14, 1978, by a vote of four to three. (See Appendix A and B).

The jurisdiction of this court is invoked under the provisions of 28 U.S.Code, Section 1257(3).

## THE QUESTIONS PRESENTED

Part 1: Prosecutor's Expression of his Personal Opinion of Defendant's Guilt.

Whether the prosecutor's expressions of their personal opinion either of the defendant's guilt or of the credibility of the state's witness violates defendant's rights under the Due Process Clause or otherwise constitute reversible error.

Part 2: Evidence of Defendant's Post Arrest Exercise of Right to Remain Silent under the Fifth Amendment.

Whether a state prosecutor may introduce evidence of the defendant's post arrest exercise of the right to remain silent *before* the defendant testifies.



Whether defendant's rights under the Due Process Clause are violated by a state prosecutor's introduction of evidence of the accused's post arrest silence either (a) during the state's case in chief, (b) by cross-examination of the defendant, or (c) by rebuttal testimony.

Whether the prosecution's introduction of evidence of such post arrest silence constitutes a prohibited comment upon the defendant's exercise of the Fifth Amendment privilege against incrimination.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section One, United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On December 16, 1976, John Patrick Meshell, Eugene Sepulvado, and defendant, Emmett Raymond Procell, were all customers at Carolyn's lounge located in Sabine Parish, Louisiana. They were friends with each other, seated at a table together, and there was no disagreement or argument existing between them. Emmett Raymond Procell had a revolver which he was showing to John Patrick Meshell and Eugene Sepulvado. It was being passed around the table and



either while being handed back to him by John Patrick Meshell or almost simultaneously and immediately afterwards, it discharged a single shot striking and killing John Patrick Meshell.

The defendant, Emmett Raymond Procell, was indicted on a charge of first degree murder which is punishable by death or life imprisonment.

During the *voir dire* examination the District Attorney advised the jury of the prosecutors' personal belief that the incident was not an accident and on a second occasion, in effect, the prosecutor's personal belief that the defendant was guilty of all of the elements of the offense. A timely objection was then made and a motion for a mistrial was denied with the judge giving an admonition to the jury which was too vague to be effective.

Again, during the District Attorney's opening statement to the jury, he indicated his personal belief with respect to the case and a motion for mistrial was again denied. During the Assistant District Attorney's closing rebuttal to the jury, he indicated his personal belief in the reliability of the state's principal witness on at least two occasions, both of which were objected to by the defense.

The District Attorney, prior to commencement of the trial, gave a notice pursuant to Article 768 of the Louisiana Code of Criminal Procedure [1] of the state's intention to

---

1. Art. 768. If the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence.

introduce "remarks, admissions, and inculpatory statements made by the defendant, Emmett Raymond Procell, to the investigating officer and/or other persons." (See Record, p. 70). Counsel for the defendant objected to this notice because of its lack of specificity. (See Record, p. 463 and 464). During the course of the trial, the prosecution for the state offered *no* remarks, admissions, and/or inculpatory statements. Instead, they placed on the stand Deputy Sheriff Floyd Terrell, Jr. and although it first appeared they were laying a foundation for an inculpatory statement, in fact, they solicited testimony from the Deputy that after the defendant was arrested and advised of his right to remain silent that he did *not* make a statement. This was vigorously objected to by counsel for the defendant with the Assistant District Attorney contending that he had the absolute right to offer evidence of the defendant's exercise of the Fifth Amendment at the time of his arrest. Both the defense counsel's objections to the testimony and motion for mistrial were overruled. (See Record, p. 638-639, as set out in Appendix D). The state then repeated the process with another law enforcement officer, Lovel Knolls (See Record, p. 638-639 as set out in Appendix D). Again, during the cross-examination of the defendant, the Assistant District Attorney brought out that the defendant did not make a statement to the offense. (See Record, p. 697 beginning at 1. 21 through 698 ending at 1. 26, as set out in Appendix D). Also that the Assistant District Attorney in rebuttal presented the testimony of Jamill Sliman, a friend and co-employee of the defendant, to the effect that the defendant made no statement to him while incarcerated. (See Record, p. 702-704, as set out in Appendix D). Again, a motion for mistrial was made on the ground that the testimony amounted to a comment upon the exercise of the Fifth Amendment



by the defendant and the motion for mistrial was overruled.

After the verdict of guilty, the defendant was sentenced to life imprisonment and he appealed. The Louisiana Supreme Court, by a vote of five to two affirmed the conviction and rulings of the trial court. The dissenting opinion of Justice Calogero and Justice Dennis agreed, however, with defendant's contention that the state's introduction of evidence of defendant's post arrest silence amounted to a comment upon the defendant's exercise of the Fifth Amendment of the United States Constitution. Defendant's application for rehearing was denied by a vote of four to three.

## REASONS FOR GRANTING THE WRIT

### Part 1. Prosecutor's Expression of his Personal Opinion of Defendant's Guilt.

On at least five different occasions, the District Attorney and Assistant District Attorney during the *voir dire* examination of the jury, the presentation of the opening statement and argument to the jury made statements which indicated their personal belief that the deceased's death was not an accident, their personal belief of the guilt of the accused, and their personal belief in the credibility of the state's principal witness. Specifications of Error Numbers 6, 7 and 9 relate to the overruling of the several motions for mistrial made by the defense counsel, the inadequacy of the court's admonition to the jury with respect to the prejudicial comments made by the District Attorney and the Assistant District Attorney and the court's ruling on the objections to the statements made by the prosecutors. They are briefed together because of the common legal issue and also to demon-

strate the cumulative affect of the repeated comments by the prosecutor's, despite timely objections and even some admonitions by the court.

The first incident occurred when District Attorney Davis was examining a prospective juror and he stated:

> "Q. (By District Attorney Davis) And the fact that we have to prove that this was not an accident is just one of the elements of the crime. We the State of Louisiana must prove this. Now obviously if we thought it was an accident, we wouldn't be here. Do you understand that?
>
> A. Yes, sir."

At this point no objection was made for the reason that it was felt more harm than good would be done by emphasizing the personal views of the District Attorney to the jury. However, the matter was soon repeated for a second time by the District Attorney in the examination of another potential juror when he stated:

> "Q. (By District Attorney Davis) And that this killing occurred in Sabine Parish, Louisiana? And that the defendant here is Emmett Raymond Procell and that he did the killing; that John Patrick Meshall was the victim of the killing and that John Patrick died as a result of the infliction on him of, in this case a gunshot wound. Do you understand?



> These are elements. At the time of the shooting, this accused had either the intent to kill the man or to injure him, bring great bodily harm upon him. Do you understand? Also elements involved the State must prove to you that it was not an accident; that it didn't occur in self defense nor in defense of others. Now these are the basic elements of the crime of first degree murder. The State has to prove those to you and *obviously we wouldn't be here if we didn't think we could do that.*"
>
> MR. BURNES: I have an objection at this time and may we approach the Bench on that?"
>
> (See Record, beginning at p. 407, 1. 29 through 1.15).

At this time counsel for the defendant objected, approached the bench and pointed out that this was a repetitive thing with the District Attorney and moved for a mistrial. The court overruled the request for a mistrial and gave an admonition beginning at page 410, 1. 20 through 411, 1. 3 which was sufficiently vague as to raise substantial questions as to whether its application was even remotely understood by the jury. In any event, the court overruled the motion for mistrial. (See Record, beginning at p. 408, 1. 13 through p. 411, 1. 18).

On a third occasion, the District Attorney, during his opening statement to the jury, said:

> "After you have heard and seen all the evidence, *we believe* you will agree that this accused, Emmett Raymond Procell, is beyond a reasonable doubt guilty of the crime for which he stands charged, murder in the first degree of John Patrick Meshell, and *that you will have no alternative but to return a verdict of guilty as charged.*" (See Record beginning at p. 478, 1.29 through p. 479, 1.4).

Another motion for mistrial was made and overruled by the court. (See Record at page 480).

On the fourth occasion, Assistant District Attorney Edwards stated during rebuttal argument to the jury:

> "Mr. Davis wasn't up there. Mr. Burnes wasn't there, either, so far as I know. So is he to argue with an eyewitness account with what happened when he was not there. I can't argue with it. *Frankly, I thought she made a very believable witness and that the evidence she gave was very strong.*" (See Record beginning at p. 764, 1.25 through p. 765, 1.7).

The objection by defense counsel was sustained and the Court again gave an admonition to disregard any personal "I believe."

Notwithstanding the ruling by the court, the Assistant District Attorney came back and stated to the jury with respect to the same witness:



> "I believe that the evidence is clear of what she said on the witness stand that she had no hard feelings towards anybody in the case, and was not kin to the Meshalls nor kin to the Procells, and I believe she said she was completely impartial. *I certainly am of the opinion that such a remark would not form the basis for antagonism on her part.*" (See Record, p. 766).

Another objection was made by counsel for the defense at this point.

In effect, what we have is persistent expression of personal opinions by the prosecutors. This is clearly reversible error under *State v. Kaufman*, 304 So.2d 300 (1974), in which the Louisiana Supreme Court stated:

> "The argument of the present prosecutor goes beyond permissible bounds. He emphasized to the jury that he would not be prosecuting if he did not feel he had a case, 'otherwise I wouldn't be here, because it's within my power to be here or not to be here'. This type of argument is an attack on the presumption of innocence afforded all accused before our courts. It emphasizes the function of the prosecutor as an officer of government and tends to exploit it. Such an argument by the prosecutor is almost universally held to be objectionable. See Annotation, cited above, Section 6(b) at 50 A.L.R. 2d 787.
>
> This type of argument has been held to be erroneous and prejudicial in Louisiana since at least

State v. Accardo, 129 La. 666, 56 So. 631 (1911). In the present case, taking into consideration also the other prejudicial errors, this improper and prejudicial argument so long reprobated in our state is an additional reason for reversal." *State v. Kaufman*, 304 So.2d 300, 308.

Additionally, the United States Fifth Circuit Court of Appeals has held in *United States v. Lamerson*, 457 F.2d 371 (1972) a prosecutor's closing argument in which he told the jury in effect that he believed in the credibility of the prosecution witnesses constituted reversible error. The court said:

"This type of comment has repeatedly been held to amount to reversible error. E. g., United States v. Brown, 5 Cir. 1971, 451 F.2d 1231; Gradsky v. United States, 5 Cir. 1967, 373 F.2d 706; Mc Millian v. United States, 5 Cir. 1966, 363 F.2d 165. The Government's proof was not so clear as to render the error harmless. It is somewhat indiscrete for the prosecutor to comment on his own personal assessment of the credibility of the witnesses, even when that assessment derives solely from what the witnesses have said while on the stand. When he makes a statement which could be construed by the jury as implying that he has additional reasons for knowing that what one witness has said is true, which reasons are not known to the jury, such comment is no longer mere indiscretion but constitutes reversible error." *United States v. Lamerson*, 457 F.2d 371-372 (1972).



Additionally, a prosecutor's statement of his personal opinion of the guilt of the defendant dispenses with the presumption of innocence, denigrates the function of the trial and usurps a position as a thirteenth juror for the prosecutor. See *Hall v. United States*, 419 F.2d 582, 587, (5th Cir. 1969).

Persistently and consistently throughout this trial in the *voir dire* examination, opening statement, and in argument to the jury the prosecutor and assistant prosecutor expressed their personal opinion and belief.

The observations by the Louisiana Supreme Court that such an opinion is permissible if the prosecutor refers to or it is apparent that his opinion is based on the record is totally inapplicable for the reason that the course of conduct started before any evidence at all was admitted. The first such statement to which any objection was made was during the *voir dire* examination when the prosecutor stated:

"Now these are the basic elements of the crime of first degree murder. The State has to prove those to you and *obviously we wouldn't be here if we didn't think we could do that.*"

In no manner whatsoever could the prosecutor be referring to evidence at that time because none had been introduced. Timely objection was made and a mistrial requested. The court overruled the request for a mistrial and gave the admonition to the jury. This signalled the onset of repetitive comments of a prejudicial nature and a series of admonitions by the judge. The cumulative prejudicial effect of this course of conduct has to be weighed along with the de-

fendant's constitutional right to a fair trial under the Due Process Clause of the Louisiana and United States Constitution.

Part II. Evidence of Defendant's Post Arrest Exercise of Right to Remain Silent under the Fifth Amendment

These specifications of Error, Number 12 and Number 14, relate to the state offering evidence that the defendant exercised his Fifth Amendment right immediately after his arrest and while incarcerated in jail prior to being bonded. This evidence was elicited by the state over the objection of the defense in three methods: (1) by direct examination on the state's case in chief, (2) by cross-examination of the defendant, and (3) by direct examination of a witness on rebuttal.

The District Attorney, prior to the commencement of trial, gave a notice pursuant to Article 768 of the Louisiana Code of Criminal Procedure of the state's intention to introduce "remarks, admissions, and inculpatory statements made by the defendant, Emmett Raymond Procell, to the investigating officer and/or other person." (See Record, page 70). Counsel for the defendant objected to this notice because of its lack of specificity. (See Record at page 463 and 464). During the course of the trial, the state offered *no* remarks, admissions, and/or inculpatory statements. Instead, they placed on the stand Deputy Sheriff Floyd Terrell, Jr., and while it appeared that they were laying a foundation for an inculpatory statement, in fact, the state solicited testimony from the Deputy Sheriff to the effect that after the defendant had been arrested and advised of his right to remain silent that he did *not* make a statement.



This was vigorously objected to by counsel for the defendant with the Assistant District Attorney contending that he had an absolute right to offer evidence of the defendant's exercise of the Fifth Amendment at the time of his arrest. Both the defense counsel's objections to the testimony and a motion for mistrial were overruled. See Louisiana Supreme Court Record at pages 635-638 as follows:

FLOYD TERRELL

* * * *

DIRECT EXAMINATION

BY THE ASSISTANT DISTRICT ATTORNEY:

Q. What is your full name, please, sir?

A. Floyd Terrell, Jr.

Q. Mr. Terrell, where do you reside?

A. At Converse.

Q. On or about December 17, 1976, were you a deputy sheriff in and for this parish?

A. I was.

Q. Are you still a deputy?

A. I am.

Q. Did you have occasion on or about the 17th day of December to arrest the accused in this case?

A. I did.

Q. Who was with you?

A. Deputy Knowles.

Q. And where was the arrest made?

A. Zwolle.

Q. Did you at the time you arrested Mr. Procell, did you read him his rights?

A. I advised him verbally of his rights.

Q. Would you tell him what you advised him of?

A. I advised him that he had the right to remain silent; anything he said could and would be used against him in a court of law; he had the right to have an attorney present during questioning; if he was unable to employ one, one would be appointed to him by the State.

Q. Did he seemingly understand the rights that you read to him?

A. He didn't comment either, any way.



Q. Did he make any statement to you at that time concerning this incident?

A. He did not.

Q. Has he to this day made any statement --

A. He has not.

Q. -- to you concerning this incident? Did he sign a waiver of rights.

A. He did not.

Q. He did not at that time? Has he to this date signed a waiver of rights?

A. Not to my knowledge.

MR. BURNES: Your Honor, I have a motion to make in connection with this

THE COURT: Step up.

(All attorneys to the Bench)

THE FOLLOWING NOT WITHIN THE HEARING OF THE JURY:

MR. BURNES: I thought he was laying the foundation for getting a statement. What he has done is he has commented on the fact that he didn't make a statement. That is reversible error, Your Honor.

MR. EDWARDS: No, sir.

MR. BURNES: Yes, it is.

MR. EDWARDS: It is only that his rights were read to him and that nobody forced him to make a statement of any kind.

MR. BURNES: Let me tell you something. Footnote 37 of the *Miranda* case says that you can't comment on the fact that Defendant didn't make a statement. There is a later case, the *Hale* case, I think the name is Hale, that went to the United States Supreme Court. He cannot present this kind of evidence, Your Honor.

MR. EDWARDS: I do not agree with you.

THE COURT: It is already in. You can make your objection.

MR. BURNES: I object and I would move for a mistrial.

THE COURT: I overrule the motion for mistrial. I am going to have to rule and move on.

MR. BURNES: You know, had he said that he made a statement, and then we took the jury out, it would have been different. But I move for a mistrial. He is not entitled to present this kind of evidence.

MR. EDWARDS: I don't agree with you.

MR. BURNES: I can get the citations in the cases.



MR. EDWARDS: I wouldn't agree with you anyway.

THE COURT: I have already overruled it. Go ahead.

MR. EDWARDS (Continuing) I have no further questions.

MR. BURNES: That was taken down that that just took place, was it not, Your Honor.

THE COURT: She took it down.

MR. BURNES: The motion and the ruling were taken down?

THE COURT: Yes.

COURT REPORTER: Yes.

MR.BURNES: All right.

That's all.

* * * * *

The state repeated the process with another law enforcement officer, Lovel Knolles.(See Record, p. 638-639 as set out in Appendix D). Again, during the cross-examination of the defendant, the Assistant District Attorney brought out that the defendant did not make a statement to the officers. (See Record p. 697 beginning at l. 21 through p. 698 ending at l. 26 as set out in Appendix D). Also, the Assistant District Attorney in rebuttal presented the testimony of Jamill Sliman, a friend and co-employee of the defendant to the effect that the defendant made no statement to him wile incarcertated. (See Record, p. 702-704

as set out in Appendix D). Again, a motion for mistrial was made on the grounds that the testimony amounted to a comment upon the exercise of the Fifth Amendment by the defendant and the motion for mistrial was overruled. (See Record, p. 704-705).

In *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 (1975), the United States Supreme Court stated:

> "Not only is evidence of silence at the time of arrest generally not very probative on a defendant's credibility but it also has a significant potential for prejudice. The dangers that the jury is likely to assign much more weight to the defendant's previous silence than is warranted." *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 at 2138.

Although *United States v. Hale, supra*, was a federal prosecution, the constitutional principal was ultimately made applicable directly to the State in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976) in which case the courts stated the issue as follows:

> "The question in these consolidated cases is whether a State prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. We conclude that use of defendant's post-arrest silence in this manner violates Due Process, and therefore reversed the convictions of both petitioners." *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 2241.



The United States Supreme Court in *Doyle v. Ohio, supra*, indicated that every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested. Specifically, the court stated:

> "Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, 94 S.Ct. 2357, 2363-2364, 41 L.Ed.2d 182 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retain or appoint counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale*, 422 U.S. at 177, 95 S.Ct. 2137. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Mr. Justice White, concurring in the judgment in

*United States v. Hale,* 422 U.S. at 182-183, 95 S. Ct. at 2139, put it very well:

> '...when a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.... Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonable conclude from *Miranda* warnings that this would not be the case.'
>
> We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio,* 96 S.Ct. 2240 at 2244.

What the Assistant District Attorney contended he had a right to do in Emmett Raymond Procell's case is exactly what is prohibited by *United States v. Hale* and *Doyle v. Ohio.* The defendant, Emmett Raymond Procell, is entitled not to be penalized because of the post-arrest (pre-trial) exercise of his Fifth Amendment rights. The evidence presented during the course of the trial is the directest of forms



of comment upon the exercise of the Fifth Amendment and as such constitutes reversible error.

The Louisiana Supreme Court in its majority opinion incorrectly attributes the questioning of Deputy Floyd Terrell, Jr. to be an inquiry on the part of the state as to whether the defendant understood his *Miranda* rights. Let us look at the transcript however, where it reads:

> Q. Did he make any statement to you at that time concerning --
>
> A. He did not.
>
> Q. Has he to this day made any statement. --
>
> A. He has not.
>
> Q. --to you concerning this incident?"

In *no way* whatsoever can those questions be interpreted to be an inquiry as to whether the defendant received and understood his *Miranda* warnings. Further, the fact that the defendant received his *Miranda* warnings was totally irrelevant inasmuch as the state did not offer any purported statement of the defendant in the entire course of the trial. Thus the state had no legitimate right even to make the threshold inquiry about the warning of the *Miranda* rights.

The interrogation of Deputy Terrell warranted the mistrial sought by the defense on the basis of the officer's testimony that the defendant exercised his Fifth Amendment right at the time of his arrest. When the state commenced its

examination of Deputy Terrell, the defense attorney justifiably believed that the prosecutor was preparing to introduce an inculpatory statement.

This belief was based in part on the written notice served by the prosecutor pursuant to Article 768 in the Code of Criminal Procedure. When it became clear that the prosecutor sought to elicit evidence of the defendant's silence at the time of the arrest, a motion for mistrial was made on the basis that the witness' testimony amounted to comment on the defendant's failure to make a statement, in contravention of *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 (1975).

Further, the state repeated its questioning concerning the defendant's post arrest exercise of his Fifth Amendment rights by another witness on its case in chief, cross-examined the defendant concerning his post arrest exercise of the Fifth Amendment, and elicited testimony from a state witness in rebuttal on the defendant's post arrest exercise of his Fifth Amendment. In fact and in reality three state witnesses were called almost solely and exclusively to give testimony concerning the defendant's exercise of his post arrest Fifth Amendment rights. This is added to the fact that the Assistant District Attorney at the time affirmatively argued that he had a right to offer such testimony of *post* arrest silence.

Clearly under these circumstances, the state has violated the defendant's Fifth Amendment and reveral is warranted under the United States Supreme Court decisions in *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 (1975) and *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976).



## CONCLUSION

Because of the prosecutors' repeated experssion of their personal belief of the guilt of the accused and the credibility of the state's witnesses, the defendant's presumption of innocence was seriously undermined and his right to a fair trial under the Due Process Clause was impaired. Accordingly, these improper prosecutorial comments constitute reversible error. Additionally and separately, the state's introduction of evidence of the defendant's post-arrest silence violated the defendant's rights under the Due Process Clause and constituted a prohibited comment upon the defendant's pre-trial exercise of his Fifth Amendment rights and, as such, warrants reversal of the conviction herein.

For the foregoing reasons, it is respectfully submitted that the decision of the Court below is erroneous and the present petition for Writ of Certiorari should be granted.

Respectfully submitted,

GRAVEL, ROY & BURNES

BY: _____
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## CERTIFICATE

I certify that a copy of the foregoing Application has been served upon opposing counsel, Honorable William J. Guste, Jr., Attorney General, State of Louisiana, State Capitol, Post Office Box 44005, Baton Rouge, Louisiana 70804; Mr. James L. Davis, District Attorney, Sabine Parish Courthouse, Many, Louisiana 71449; Abbott J. Reeves, Assistant District Attorney, Research and Appeals, 419 Derbigny Street, Gretna, Louisiana, by placing same in the United States Mail, proper addressed, with sufficient postage affixed thereto.

Alexandria, Louisiana this day of March, 1979.

J. MICHAEL SMALL



## APPENDIX A

STATE of Louisiana

v.

Emmett Raymond PROCELL

No. 61923

Supreme Court of Louisiana

Nov. 13, 1978.

Rehearing Denied Dec. 14, 1978.

SUMMERS, Justice.

In an indictment filed on February 17, 1977 the Grand Jury of Sabine Parish charged Emmett Raymond Procell with the December 16, 1976 first degree murder of John Patrick Meshell. La.Rev.Stat 14:30.[1] In a trial by jury defendant Procell was found guilty as charged. In a separate sentencing hearing the jury recommended life imprisonment without benefit of probation, parole, or suspension of sentence. Prior to imposition, defendant's motion for a new trial was denied, and he was then sentenced to life in prison

1. La. Rev. Stat. 14:30.

"First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

"Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury."

at hard labor without benefit of probation or parole. This appeal followed. All assignments of error urged on this appeal are considered.

During the early morning hours of December 16, 1976 defendant Procell joined Eugene Sepulvado and Patrick Meshell in the Carolyn Lounge, an establishment near Zwolle in Sabine Parish where drinks were served and the customers danced. Procell, Sepulvado and Meshell sat together at a table. When Debra Parker arrived at the lounge both Meshell and Procell asked her to dance. She declined Procell's invitation, telling him she was going to dance with Meshell. After dancing with Debra Parker, Meshell returned to the table at which Sepulvado and Procell were seated. Procell was then heard to say, "Go ahead and laugh if you think it's funny." Immediately thereafter a shot was heard and Meshell fell across the table fatally wounded. Procell sat at the table momentarily, placed a revolver in his trouser belt, and walked out of the lounge. He made no effort to assist Meshell. Procell was arrested later that morning and charged with murder.

[1] *Assignments 3 and 4*: Prior to trial, defendant filed a motion to quash, alleging that the indictment failed to charge an offense which is punishable under a valid statute. La. Code Crim.Pro. art. 532(1). Particularly, the motion alleged that the statute defining first degree murder and prescribing the death penalty therefor was unconstitutional, for it was in violation of the Eighth Amendment prohibition against cruel and unusual punishment, and in contravention of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.



Further, the motion alleged that Article 814 of the Code of Criminal Procedure, Louisiana's responsive verdict statute is unconstitutional in that it permits verdicts of guilty, guilty of second degree murder, guilty of manslaughter, and not guilty to be rendered in response to a charge of first degree murder. For these reasons the statute lacks standards to guide the jury's selection of persons charged with first degree murder. It is alleged that these responsive verdicts invite the jurors to disregard their oaths and choose a verdict for a lesser offense, whenever they feel that the death penalty is inappropriate.

To support these contentions the defense relies upon the decision of the United States Supreme Court in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

The trial judge denied the motion to quash, and the defense assigns error.

*Roberts v. Louisiana*, supra, held the mandatory death penalty unconstitutional in Louisiana's first degree murder statute enacted in 1973. Since that time, Louisiana's first degree murder statute (La.Rev.Stat. 14:30) has been amended by Act 657 of 1976, the statute under which defendant is being prosecuted in the instant case. The statute no longer prescribes a mandatory death penalty when considered together with Act 694 of 1976, referred to hereinafter.

By Act 694 of 1976 the Legislature enacted Article 905 of the Code of Criminal Procedure. According to its provisions, following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing. In such a hearing before the same jury that determined the issue

of guilty the focus is upon the circumstances of the offense and the character and propensities of the offender. Aggravating and mitigating circumstances are considered. A sentence of death can be imposed only upon the unanimous recommendation of the jury. If, at the hearing, the jury finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence, and the judge shall impose sentence accordingly. *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Thus *Roberts v. Louisiana*, supra, is no longer authority for a claim that Louisiana's death penalty statute is unconstitutional. Furthermore, while the effect of the responsive verdict statute (La.Code Crim.Pro. arts. 809, 814) on the imposition of the death penalty may have been a factor which induced the Roberts Court to invalidate the death penalty, the responsive verdict statute applicable to first degree murder was not declared unconstitutional.

As we noted in *State v. Palmer*, 344 So.2d 964 (La. 1977), "The thrust of the *Roberts* decision was the Court's condemnation of the mandatory character of the death penalty..." Therefore, when the Legislature amended the first degree murder statute and enacted the sentencing hearing statute, it did not consider that amendment or repeal of the responsive verdict statutes was necessary. Insofar as Articles 809 and 814 of the Code of Criminal Procedure were concerned they remained effective and valid. Other decisions since *Roberts* have recognized the viability of these responsive verdict statutes. *State v. Qualls*, 353 So.2d 978 (La. 1978); *State v. James*, 339 So.2d 741 (La.1976); *State v. Finley*, 337 So.2d 1151 (La.1976); *State v. Turner*, 337 So.2d 1090



(La.1976); *State v. McCoy*, 337 So.2d 192 (La.1976).

Moreover, at the sentencing hearing, the State's attorney announced that the State was not asking for the death penalty.

These assignments are without merit.

[2,3] *Assignment 5:* Because the State did not ask for the death penalty and the jury did not recommend that punishment, the defense contends it was error for the court to permit the District Attorney during voir dire examination to excuse prospective jurors for cause because they expressed conscientious scruples against the infliction of capital punishment. La.Code Crim.Pro. art. 798(2).

This contention is based on the theory that the juror's attitude toward the death penalty no longer plays a part in the determination of guilt in a first degree murder trial because the guilt determination phase of the bifurcated trial of a first degree murder charge does not concern sentencing; that question is subsequently determined at the sentencing hearing. La.Code Crim.Pro. art. 905.

By permitting the State to challenge jurors for cause when they expressed conscientious scruples against the death penalty, it is argued the prosecutor was able to challenge more jurors than the defendant because the defendant is not authorized to challenge on that ground. Consequently, defendant exhausted his peremptory challenges long before the State.

Several answers are suggested to this contention. The Dis-

trict Attorney did not announce that the State was not asking for the death penalty until after the verdict was rendered and the record sheds no light on when this decision was made. If it was not made until after the verdict, the voir dire examination on the question of the juror's attitude toward the death penalty was certainly relevant before that time. This is o because in all probability the same jurors would participate in the sentencing hearing and their attitude would be relevant to a charge which prescribed the death penalty. For, in the event of a guilty verdict, the same jurors would be called upon to decide whether the death penalty should be recommended. Nor do we understand that the District Attorney's recommendation on sentence is binding upon the jury. Despite the fact that the State did not ask for the death penalty, the jury was empowered to recommend otherwise, thus making their attitude toward the death penalty material to the prosecution under any circumstance when the charge is first degree murder. It was proper, therefore, to ascertain the attitude of the jury on that subject.

The defense has not designated that portion of the record which supports the contention that the defendant's peremptory challenges were depleted long before the State exhausted its peremptory challenges. And if he did make such a showing, we do not understand that it would prejudice the defendant to the extent that he would be denied a fair trial.

*Assignments 6, 7 and 9:* Defendant contends that error occurred during voir dire examination, during the testimony at the trial, and during the argument to the jury because the District Attorney and his assistant expressed their own personal opinions as to the guilt of the accused. Although defense counsel moved for a mistrial on each occasion, the



motions were denied and defendant contends that the trial judge did not adequately admonish the jury.

The defense cites five such instances in brief. Because one of the remarks was not objected to, we only consider four.

While examining a prospective juror on voir dire the prosecutor stated the elements of the crime that State must prove are: the killing was not an accident; and it did not occur in self-defense or the defense, of others. The prosecutor concluded: "Now these are the basic elements of the crime of first degree murder. The State has to prove those to you and *obviously we wouldn't be here if we didn't think we could do that.*" When defense counsel objected, the trial judge admonished the jury as follows:

> "I would admonish you to disregard any statement that would tend to destroy the absolute presumption of innocence which the accused has throughout this trial. This is accorded any defendant in this or any other case. I would instruct you that each of you understands that an accused in any criminal case is presumed to be innocent until the burden of proving his guilt beyond a reasonable doubt has been established. Any remark made by the State's attorney which would tend to minimize that very precious right is to be disregarded by you."

In his opening statement to the jury the District Attorney said:

> "After you have heard and seen all the evidence, we *believe* you will agree that this accused, Emmette Raymond Procell, is beyond a reasonable doubt guilty of the crime for which he stands charged, murder in the first de-

gree of John Patrick Meshell, and that *you will have no alternative but to return a verdict of guilty as charged.*"

No contemporaneous objection was made by the defense, but after a while defense counsel approached the bench and again moved for a mistrial. The motion was denied but the trial judge did admonish the jury at length, instructing them to disregard any statements made by the prosecutor "as to what he believed that you will do." He emphasized that the personal beliefs of the prosecutor were impermissible and should not be considered. Whereupon the District Attorney finished his opening statement.

Later, in the State's rebuttal argument, the Assistant District Attorney, referring to the testimony of a State's witness, remarked, *"Frankly, I thought she made a very believable witness and that the evidence she gave was strong."*

Again defense counsel objected and the trial judge sustained the objection, admonishing the jury to disregard what the prosecutor "believed." Continuing his rebuttal argument and again referring to trial testimony of the same witness, the prosecutor said, *"I certainly am of the opinion that such a remark would not form the basis for antagonism on her part."* When the defense objected, the trial judge again instructed the jury that it should disregard the prosecutor's expression of opinion.

[4,5] Although it is generally considered erroneous for the prosecuting attorney to declare his individual opinion or belief that the accused is guilty when the accusation is made in such a manner that the jury may understand that the prosecutor's belief is based on evidence dehors the



record, such an opinion is permissible if the prosecutor refers to, or it is apparent that his opinion is based on, the evidence of record. *State v. Sercovich,* 246 La. 503, 165 So.2d 301 (1964). In this case the beliefs and opinions expressed were based upon the evidence produced at the trial. There was no attempt on the part of the prosecutors to express beliefs or opinions based upon facts or circumstances *dehors* the record. None of the remarks directly urged a guilty verdict on the basis of evidence outside the record or solely on the beliefs of the prosecutors. Most of the remarks expressed the prosecutor's opinion of a witness' testimony; an argument on the credibility of a witness being proper. La. Code Crim. Pro.art. 774; State v. May, 339 So.2d 764 (La. 1976).

[6] If it can be considered that the remarks of the prosecutors were impermissible under the rule expressed in *Sercovich,* the law nevertheless provides a remedy for the defendant. Article 771 of the Code of Criminal Procedures mandates that the judge "shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the State, in the mind of the jury." The judge did amonish the jury in the instant case, and properly ruled that a mistrial should not be granted. La.Code Crim.Pro.art. 775; *State v. Duke,* 358 So. 2d 293 (La.1978); *State v. Rittiner,* 341 So.2d 307 (La. 1977); *State v. Landry,* 262 La. 32, 262 So.2d 360 (1972).

These assignments are without merit.

*Assignments 12 and 14:* The defense contends that the trial judge erroneously overruled several objections to testimony elicited by the State to the effect that after receiving

the *Miranda* warnings, defendant remained silent after arrest and while he was incarcerated prior to his release on bail.

In brief the defendant asserts that evidence was elicited by the State over defense objections in three ways: 1) by direct examination on the State's case in chief; 2) by cross-examination of the defendant; and 3) by direct examination of a witness on rebuttal.

Deputy Floyd Terrell, Jr., one of the two arresting officers, testified for the State. While he was being examined by the prosecutor, this colloquy occurred.

"Q. [By the prosecutor] Did you at the time you arrested Mr. Procell, did you read him his rights?

A. [Deputy Terrell] I advised him verbally of his rights.

Q. Would you tell him what you advised him of?

A. I advised him that he had the right to remain silent; anything he said could and would be used against him in a court of law; he had a right to have an attorney present during questioning; if he was unable to employ one, one would be appointed to him by the State.

Q. Did he seemingly understand the rights that you read to him?

A. He didn't comment either, any way.



Q. Did he make any statement to you at that time concerning this incident?

A. He did not.

Q. Has he to this day made any statement.--

A. He has not.

Q. -- to you concerning this incident; Did he sign a waiver of rights?

A. He did not.

Q. He did not at that time? Has he to this date signed a waiver of rights?

A. Not to my knowledge."

At this point defense counsel objected and moved for a mistrial. Defense counsel made no request for an admonition. In his argument on the objection, the prosecutor stated that the interrogation was designed to establish that Procell received the *Miranda* warnings and that he was not compelled to make a statement.

Read in the light of the prosecutor's argument the questions and answers may plausibly be considered to have that meaning. And it is feasible to conclude that the jurors understood the witness' answers in that light and not as an effort by the State to attack defendant's credibility with an inference that he failed to deny his guilt.

Insofar as this quoted interrogation is concerned, it may be read as evidence establishing that Procell received the *Miranda* warnings and claimed the rights incident thereto by not giving a statement, and that he did not waive those rights.

As the State's next witness, the prosecutor called Lovell Knowles, the other arresting officer. He testified that he accompanied Deputy Terrell when they arrested Procell at 2:40 on the morning of December 16. When he was asked by the prosecutor if Procell made "any statements in your presence?", defense counsel objected, the question was not answered, and the witness was tendered for cross-examination.

[7] Procell took the stand to testify in his own behalf. His version of the killing was that it was accidental. He testified that as he sat at the table in the lounge with Sepulvado and Meshell, Meshell asked to see Procell's handgun which Sepulvado was then holding. Sepulvado handed the gun to Meshell and shortly thereafter, as Meshell was handing the gun back to Procell, Procell reached for the pistol and as he gripped the handle it discharged killing Meshell.

On cross-examination this colloquy occurred:

"Q. [The prosecutor] Do you recall when is the first time that you ever told anybody that you were passing that gun around the table?

A. [Defendant] I could have told Andrew Sepulvado.

Q. Did you tell any of the officers or anyone else you talked to that day or for the next week that you were passing that gun around the table?



A. I could have told Andrew Sepulvado.

Q. Did you tell any of the officers or anyone else you talked to that day or for the next week that you were passing that gun around the table?

A. No.

Q. Did you tell anybody there and I'm not suggesting--"

An objection was made that the prosecutor was eliciting testimony from defendant concerning his failure to make statements to the officers. No motion for a mistrial was presented and the defense did not request an admonition to the jury.

It should be emphasized that this last interrogation is of the defendant on cross-examination. And again it may be said that the interrogation was not an effort to elicit testimony of defendant's post-arrest silence after receiving the *Miranda* warnings. A review of defendant's entire testimony makes it clear that the questioning was proper cross-examination of defendant which pertained precisely to his testimony on direct examination.

[8] Another incident at the trial involves the interrogation of Jamie Sliman, a co-employee of defendant, who visited defendant in jail soon after he was incarcerated. He was asked if defendant told him anything about the shooting. He answered that he never asked him and defendant did not mention the occurrence. No inference should be gained from this abbreviated encounter that the State sought to establish defendant's refusal to talk.

[9] Otherwise, if these colloquies are read as interrogations eliciting testimony of Procell's post-arrest silence after having been given the *Miranda* warnings, the motion for a mistrial and request for admonition were the proper vehicles under Louisiana Law for righting the claimed injury to defendant. Article 771 of the Code of Criminal Procedure requires only that the trial judge admonish the jury to disregard the quoted remarks and comments. However, no request that the trial judge admonish the jury was made. Granting a mistrial in this situation was therefore discretionary with the trial judge "if [he] . . . is satisfied that an admonition is not sufficient to assure the defendant a fair trial." La.Code Crim.Pro.art 771; *State v. Smith*, 336 So.2d 867 (La.1976). The trial judge was satisfied that defendant could have a fair trial.

This Court is not unmindful of the decisions of the United States Supreme Court in *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) and *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). *Hale* stands for the proposition that it is reversible error to elicit testimony concerning defendant's silence during police interrogation after he has been arrested and given the *Miranda* warnings. While the *Hale* decision may not be binding in this case since it involved an evidentiary rule applicable to the federal judiciary, the case did serve as a basis for the decision in *Doyle v. Ohio* which elevated the same proposition to the dimension of a constitutional right applicable to the states. And, although we do not read the testimony at issue here as an effort by the State to point out defendant's silence after receiving the *Miranda* warnings, we shall nevertheless decide that if such an error did occur the error was harmless.



[10] As the brief reference to the facts in this opinion disclose, the implausible defense of accident was rejected by a unanimous jury. In a three-day trial producing a record containing 825 pages, the evidence convincingly established defendant's guilt beyond a reasonable doubt, and no effort was made by the prosecution to exploit defendant's silence in order to impeach his testimony. *Doyle v. Ohio*, supra, and *State v. Smith*, 336 So.2d 867 (La.1976).

*Assignment 15*: After verdict and before sentence defendant filed a motion for a new trial, alleging that the verdict was contrary to the law and evidence in that there was a total absence of evidence to show that defendant had a specific intent to kill or inflict great bodily harm. In addition, defendant reurged the alleged errors which have been considered in this opinion. The motion was denied and the ruling is claimed as error on this appeal.

[11] Louisiana's Constitution limits this Court's review of criminal conviction on appeal to questions of law. La. Const. art. V. § 5(C). It is only when there is a total lack of evidence of an essential element of a crime that a question of law is presented. For it is contrary to law that anyone should be convicted when there is no evidence of his guilt. *State v. Proctor*, 354 So.2d 488 (La.1977); *State v. Hatter*, 350 So.2d 149 (La.1977); *State v. Marks*, 337 So.2d 1177 (La.1976).

[12] Another rule of law relevant to the question this assignment presents is:

> "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for *though intent is a question of fact, it need not be proven as a fact, it may be inferred from the*

*circumstances of the transaction."* (emphasis added). La.Rev.Stat. 15:445. See also *State v. Garner,* 241 La 275, 128 So.2d 655 (1961).

From this record there are ample facts from which the requisite intent may be inferred. Among other, an eyewitness saw Procell holding the gun pointed at Meshell as it was fired.

The remaining contentions presented by the motion for a new trial involve the assignments of error already considered and found to be without merit. The motion for a new trial was properly denied.

For the reasons assigned, the conviction and sentence are affirmed.

CALLOGERO, J., dissents and assigns reasons.

DENNIS, J., dissents for the reasons assigned by CALOGERO, J.



APPENDIX B

STATE of Louisiana

v.

Emmett Raymond PROCELL.

No. 61923

Supreme Court of Louisiana.

Nov. 12, 1978

Rehearing Denied Dec. 14, 1978.

CAOLGERO, J. dissents and assigns reasons.

DENNIS, J., dissents for the reasons assigned by CALOGERO, J.

CALOGERO, Justice, dissenting.

I disagree with the majority's conclusion in connection with assignment number 14, firmly believing that the trial interrogation of Deputy Terrell warranted the mistrial sought by defense on the basis of the officer's testimony regarding Procell's silence at the time of his arrest. When the state commenced its examination of Deputy Terrell, the defense attorney was justified in believing, as he later stated he did, that the prosecutor was preparing to introduce an inculpatory statement.[1] Thus, he did not at first object to the line

1. The state's answer to the defense prayer for oyer stated that the defense was not entitled to have furnished oral statements, possibly implying that the state possessed such statements. Before its opening statement, the prosecution complied with article 768 of the Code of Criminal Procedure, advising of its intention to use statements made to investigating officers or others. Thus the belief of the defense attorney had an ample basis.

of questioning quoted in the majority opinion. However, when it became clear that the prosecutor sought to elicit evidence of Procell's silence at the time of the arrest, the defense attorney moved for a mistrial on the basis that the witness' testimony amounted to a comment on the defendant's failure to make a statement, in contravention of *United States v. Hale,* 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

In *State v. Montoya,* 340 So.2d 557 (La. 1976) the state sought testimony regarding defendant's silence under police interrogation to prove that he committed the crime charged. The Court, after quoting extensively from *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), which held that a post-arrest silence may not be used to impeach a defendant who gives exculpatory trial testimony, held that it was reversible error to permit the state to use testimony about the defendant's silence. The quotation from the *Doyle* case contained language from the concurring opinion of Mr. Justice White in *Hale,* which opined that ". . .when a person under arrest is informed, as *Miranda* requires that he may remain silent, that anything he says may be used against him . . . it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest . . ."

As in *Montoya,* the state attempted to use Procell's silence after arrest in conjunction with other evidence to establish commission of the crime. That the defendant subsequently took the stand in this case (unlike in *Montoya)* is of no relevance, since the evidence of his silence was presented during the case-in-chief (as well as at other times during the trial), at a time when it was by no means certain that Procell would testify in his own defense.



The trial judge should have granted the mistrial sought. The questions of the state and answers of Deputy Terrell could have no other effect, in my view, than to call to the jury's attention the fact of defendant's silence. The prosecutor's claim that the questions were designed to establish that the defendant was given his *Miranda* warnings and, thus, was not compelled to make a statement is irrelevant, in light of the effect of the exchange. Moreover, the State is only required to establish that *Miranda* warnings were given before it introduces evidence of a confession or inculpatory statement. *See State v. Henry,* 352 So.2d 643 (La.1977). It need not establish such fact in connection with the testimony of an officer who will relate that no confession or statement was made.

I respectfully dissent.

APPENDIX C

STATE OF LOUISIANA NO. 24,681, CRIMINAL DOCKET
VERSUS ELEVENTH JUDICIAL DISTRICT COURT
EMMETT RAYMOND PROCELL SABINE PARISH, LOUISIANA

PER CURIAM COMMENTS TO ASSIGNMENT OF ERRORS

1

Assignment of error No. 1 has no merit, and needs only the comment that the motion for oyer filed by the defendant was heard on March 16, 1977, a date prior to the enactment of the Discovery Act (515 of 1977), therefore he is not entitled to testimony given before the Grand Jury. The defendant in this case testified before the Grand Jury, and also took the stand at the trial of this case as a witness in his own behalf, but no attempt was made by the State to use defendant's testimony before the Grand Jury. (See State v. Sneed, 328 So.2d 126)

2

Assignment of error No. 2 requires no comment.

3

Assignment of error No. 3 requires no comment.

4

Assignment of error No. 4 requires no comment.



5

Assignment of error No. 5 requires no comment.

6

Assignment of error No. 6 requires little if any comment, other than to say that proper admonitions were given to the jury at every instance where there was even the slightest suggestion that the prosecutor was injecting his personal beliefs, however I would point out that I do not consider that the prosecutor ever said "I" unless it was used in connection with what the evidence would show.

7

Assignment of error No. 7: (see 6 above).

8

Assignment of error No. 8 apparently has reference to a motion for mistrial because of an objection to the prosecutor's opening statement. The court admonished the jury to ignore any statements made by the prosecutor that tended to invade the province of either the jury or of the court.

9

Assignment of error No. 9: (see 8 above).

10

Assignment of error No. 10 does not specify exactly what

ruling of the court he is objecting to, but I do not recall opinion testimony per se being allowed. The witness was permitted to express her sense or awareness of her feelings that she felt that the accused was watching her, as a result of her observations of the accused as he was sitting at a table. I found no merit to counsel's objection to that line of questioning.

11

Assignment of error No. 11 has no merit, because the jury was entitled to see evidence of the nature and type of wound received by the victim, especially when the defense of accidental death was made.

12 through 15

Assignment of errors 12, 13, 14 and 15 all relate to a claimed violation of the accused's Constitutional Fifth Amendment rights.

At the outset of the defense of this case, by motion for oyer, the accused's counsel stated that the accused had testified before the Grand Jury, but none of his testimony was made known to the court or to the trial jury.

Counsel for the accused in his opening statement to the jury indicated that he intended to place the accused on the witness stand to testify in his own behalf, and that the accused's defense would be that the victim died as a result of an accidentally discharged pistol which was owned by the accused, and which had been taken by him into the lounge where the killing occurred. Counsel stated to the jury that the defense intended to show that while the pistol was being passed around at the table where the accused, the victim and one other person were seated, that the pistol was accidentally



discharged fatally wounding the victim. Counsel further stated to the jury that he intended to show by the evidence that the accused was shocked by what had happened, and that after a moment or two he left, passing other people, and thereafter dispossessed himself of the gun, then went to the law enforcement officers and turned himself in and that the gun subsequently was turned in to be available to the jury.

The accused, Emmett Raymond Procell, in fact voluntarily testified during the trial in his own defense, and testified that the pistol discharged accidentally while the victim was handing the pistol to him (the accused), and further that after the gun was fired, he sat for a few minutes, got up and walked out, went to his car, and voluntarily turned himself in to the officers. On cross-examination he stated that he went straight to the police station in Zwolle, but no one was there so he left and went to the home of Andrew Sepulvado, then left and went back to the police station, but after leaving Speulvado's house he went to the game reserve and threw the gun near a trash pile before going to the police station. Accused testified that while he was in jail some fifteen days after the shooting incident, that Mr. Whittel, an investigatpr employed by Mr. Burnes (attorney for the accused) came to see him (accused) and was told about the gun.

Now, turning to the specific objection and ruling of the court to which counsel for the accused complains, attention is directed to the testimony of Deputy Sheriff Flloyd Terrell, Jr. who was called as a witness by the State. Officer Terrell after taking the accused into custody testified that he verbally explained to the accused his rights, after which the State's attorney asked the witness four(4) distinct questions as to whether the accused made any statement concerning the incident, and the witness responded to each of the ques-

tions that the accused did not; all of these questions and answers were made without any objection whatsoever by counsel for the accused, but there followed a question by the State as to whether the accused ever signed a waiver of his rights, Counsel for the accused stated that in that connection he had a motion to make, at which time both participating counsel approached the bench, where out of the hearing of the jury, counsel for the accused stated that he thought that the prosecutor was laying the foundation for a statement, and he argued that a reversible error had been committed and moved for a mistrial. I stated out of the hearing of the jury that the testimony was already in and overruled the motion for a mistrial (See T. page 517, line 16 to T. page 518, line 29).

Assuming that counsel for the accused was under the belief that the prosecutor was laying the foundation for a statement by the accused when the first question was asked, there followed, without objection, three (3) additional questions and answers along the same line, again without any objection, and then he only requested a mistrial.

While the facts of the present case are quite different from the facts in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L. Ed. 2d 91 (1976); and United States v. Hale, 422 U.S. 177, 95 S.Ct. 2137, which in my humble opinion would make the holding in those cases inapplicable to the present case, I nevertheless concluded that in the present case, the defendant waived his rights by failing to timely object, thereby affording the court ample opportunity to rule. Mandatory mistrial under C.Cr.P., article 770 does not apply because the defense had already stated that the accused would testify and he, in fact, did testify.



As for the testimony of the other officer, Lovell Knowles, counsel for the accused did object to the prosecutor's question, but before the court could make any ruling, and without the witness making any answer, the prosecutor stated, "I have no further questions of the witness", which was further clarified and confirmed by me when I asked the prosecutor the question, "You have no further questions?" Because the witness had not answered I deemed that the prosecutor had withdrawn the question and that the necessity for a ruling was then rendered moot. The defense counsel, though, insisted upon a ruling which I then replied, "Overruled", for the reason that to have ruled otherwise would have had the effect of striking the question which the prosecutor had already indicated he was not pursuing for an answer. No answer was given by the witness. The door on any impermissible questions had already been opened to the jury by the answers given by the previous witness. No prejudice resulted. See State v. Qualls, 353 So.2d 978.

While I think that the defense effectively waived any rights, as aforesaid, if there be any lingering doubt about the matter, it was completely resolved when the accused voluntarily took the stand and testified, *without contemporaneous objection* as follow, beginning at line 17, page 568 and concluding at line 8, page 569 of the transcript:

"Q. And after that you went and got rid of the gun?

A Yes, sir.

Q And you come back to the police station?

A Yes, sir.

Q You remember that?

A I do remember that.

Q If you went anywhere else, would you remember it?

A I don't know. My mind was awful messed up, let me tell you.

Q Did you tell the officers anything about how it happened?

A My recollection is I didn't. I don't remember telling them nothing.

Q You didn't tell them anything about it?

A No, sir.

Q While you were in jail, did any of your friends come visit you?

A One did.

Q Who?

A A guy that used to work for me, Jamill Sliman.

Q Jamill Sliman?

A Yes, sir.

Q Did you tell him anything about how it happened?

A. I didn't."



Further along on cross-examination of the accused by the prosecutor the witness testified, *without objection,* as follows, beginning at line 21, page 577 and concluding at line 27, page 577:

"Q Do you recall when is the first time that you ever told anybody that you were passing that gun around the table?

A I could have told Andrew Sepulvado.

Q Did you tell any of the officers or anyone else you talked to that day or for the next week that you were passing that gun around the table?

A No."

Finally, Counsel for the defense, beginning at line 29, page 577, voiced the objection as follows:

> "MR. BURNES: Same objection I made earlier about commenting on failing to make statements to officers. I want to renew and make again."

I had no alternative but to overrule counsel's objection at this stage because to do otherwise would have had the effect of striking testimony, which is unknown to the criminal law of Louisiana. See State v. Provost, 352 So.2d 661.

I do not recall any instance in which the prosecutor, during the course of his argument to the jury, made any comments concerning the accused's post arrest silence and to which any contemporaneous objections were made by counsel for the accused.

Earlier herein I have stated that factually the case at bar is distinguishable from Doyle and Hale, supra. Of equal dignity to the above discussed waiver for failure to make contemporaneous objections is another type of waiver found in this case. Acknowledging that the accused has the Constitutional right to remain silent following his arrest, without undertaking to exhaustively list the several options that were opened to him, there are several which are readily apparent. One, he could have remained silent thoughout all of the proceedings. Another option which he could have exercised was to remain silent in all pre-trial hearings and during the interval between arrest and trial, but then chosent to testify on his own behalf at the trial. Ordinarily, under either of the aforesaid options no adverse inference could be drawn from his post arrest silence. The accused chose neither of the aforesaid options, but instead he, upon advice of counsel did something most unusual in most criminal cases within my professional experience. According to the accused's own statement when testifying on his own behalf at the trial, he voluntarily stated that shortly after the shooting incident he voluntarily turned himself in for arrest; but he also made a very significant statement that just before turning himself in that he threw away the pistol that he had been carrying, and which was the same pistol that discharged causing the death of the victim in this case; in other words he intentionally dispossessed himself of material evidence. The arresting officers, following the voluntary surrender by the accused, explained to him his Miranda rights, but they did not interrogate him. About fifteen (15) days subsequent to the shooting, Mr. Edward Whittel, a private investigator, (employed by the defendant's employed defense counsel, Mr. Richard Burnes) went to the jail where the accused was being incarcerated, and ascertained from the accused the location of the gun, and Mr. Whittel thereafter, long before the trial of this case, located the gun, and then took it to Mr. Burnes in Alexandria, in whose custody it remained until it was voluntarily turned over to the Sabine Sheriff's Office. A joint stipulation by the prosecutor and the defense counsel was filed in evidence to prove the above recited facts. The stipulation was acknowledged by the accused when he personally testified on his own behalf.



The accused in this case, with full advice of his counsel, decided to give evidence to the state between the time of his arrest and before trial. This action was apparently done for the purpose of enabling him to better reconcile his earlier inculpatory behavior with his plea that the killing was accidental. This, of course, was his choice. The defendant would have had the jury to draw all favorable inferences by his having voluntarily surrendered to the police, by his voluntarily recovering the pistol and turning it over to the police before trial, and by voluntarily returning to the court for trial after having been out of the country, but this same defendant did not want any inference to be drawn from his failure to have surrendered the gun at the time of his voluntary submission to arrest. In this court's opinion the voluntary act, upon advice of counsel, of turning the gun over to the police, after his arrest and before trial, without any urging by the police, constituted a waiver of his Constitutional right to silence, thereby opening the door to a full disclosure by the state of the facts and circumstances surrounding the entire matter.

It is interesting to note that Justice Dennis, in the case of State v. Montoya, 340 S. 2d 557, while not finding a waiver of rights in that case, did envision instances where such waivers could exist.

In the Doyle case, supra, the prosecutor was not permitted to impeach a defendant's *exculpatory* story by cross-examining the defendant about his failure to have told the story after receiving Miranda warning at the time of arrest.

In the present case the prosecutor was merely attempting to illuminate the motives and intent of the accused who had voluntarily attempted to extricate himself from his own admitted *inculpatory* actions in order to square himself on his plea of accidental death. The act of surrendering the gun by the accused, with its full implications, required full exposure.

For the reasons aforesaid, I feel that all of my rulings on objections and motions were correct, and that the accused received a fair trial.

Many, Louisiana, this 23rd day of March, 1978.

s/ Jack E. Burgess
JUDGE

Filed March 23, 1978
Geraldine Curtis
Dy. Clerk



APPENDIX D

EXTRACTS FROM THE TESTIMONY

LOUISIANA SUPREME COURT RECORD PAGES 635-638 AS FOLLOWS:

FLOYD TERRELL

CALLED as a witness by the State, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE ASSISTANT DISTRICT ATTORNEY:

Q What is your full name, please, sir?

A Floyd Terrell, Jr.

Q Mr. Terrell, where do you reside?

A At Converse.

Q On or about December 17, 1976, were you a deputy sheriff in and for this parish?

A I was.

Q Are you still a deputy?

A I am.

Q Did you have occasion on or about the 17th day of December to arrest the accused in this case?

A I did.

Q Who was with you?

A Deputy Knowles.

Q And where was the arrest made?

A Zwolle.

Q Did you at the time you arrested Mr. Procell, did you read him his rights?

A I advised him verbally of his rights.

Q Would you tell him what you advised him of?

A I advised him that he had the right to remain silent; anything he said could and would be used against him in a court of law; he had the right to have an attorney present during questioning; if he was unable to employ one, one would be appointed to him by the State.

Q Did he seemingly understand the rights that you read to him?

A He didn't comment either, any way.

Q Did he make any statement to you at that time concerning this incident?

A He did not.

Q Has he to this day made any statement --



A He has not.

Q -- to you concerning this incident? Did he sign a waiver of rights?

A He did not.

Q He did not at that time? Has he to this date signed a waiver of rights?

A Not to my knowledge.

MR. BURNES: Your Honor, I have a motion to make in connection with this

THE COURT: Step up.

(All attorneys to the Bench)

THE FOLLOWING NOT WITHIN THE HEARING OF THE JURY:

MR. BURNES: I thought he was laying the foundation for getting a statement. What he has done is he has commented on the fact that he didn't make a statement. That is reversible error, Your Honor.

MR. EDWARDS: No, sir.

MR. BURNES: Yes, it is.

MR. EDWARDS: It is only that his rights were read to him and that nobody forced him to make a statement of any kind.

MR. BURNES: Let me tell you something. Footnote 37 of the Miranda case says that you can't comment on the fact that Defendant didn't make a statement. There is a later case, the Hale case, I think the name is Hale, that went to the United States Supreme Court. He cannot present this kind of evidence, Your Honor.

MR. EDWARDS: I do not agree with you.

THE COURT: It is already in. You can make your objection.

MR. BURNES: I object and I would move for a mistrial.

THE COURT: I overrule the motion for mistrial. I am going to have to rule and move on.

MR. BURNES: You know, had he said that he made a statement, and then we took the jury out, it would have been different. But I move for a mistrial. He is not entitled to present this kind of evidence.

MR. EDWARDS: I don't agree with you.

MR. BURNES: I can get the citations in the cases.

MR. EDWARDS: I wouldn't agree with you anyway.

THE COURT: I have already overruled it. Go ahead.

MR. EDWARDS: (Continuing) I have no further questions.

MR. BURNES: That was taken down that just took place, was it not, Your Honor.



THE COURT: She took it down.

MR. BURNES: The motion and the ruling were taken down?

THE COURT: Yes.

COURT REPORTER: Yes.

MR. BURNES: All right. That's all.

(WITNESS EXCUSED)

LOUISIANA SUPREME COURT RECORD PAGES 638-639 AS FOLLOWS:

LOWELL KNOLLS

called as a witness by the State, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE ASSISTANT DISTRICT ATTORNEY:

Q What is your full name, please, sir?

A Lovell Knowles.

Q Mr. Knowles, were you with Mr. Terrell when he made the arrest of Mr. Procell after this incident that occurred?

A Yes, I was.

Q Did you hear the rights read to him?

A Yes, sir.

Q What time of the day was the arrest made and on what date?

A 2:40 the 17th of December.

Q Now speak up. The jury has to hear you.

A I believe it was about 2:40 when we arrested him.

Q On the 17rh?



A Yes, sir.

Q Of December?

A 17th of December.

Q Is that 2:40 in the afternoon or the morning?

A The morning.

Q 2:40 in the morning?

A Yes, sir.

Q On the 17th?

A Yes, sir.

Q Did he make any statement in your present?

MR. BURNES: I object to that question. It is an improper question.

MR. EDWARDS: I have no further questions of the witness.

THE COURT: You have no further questions?

MR. BURNES: Did you rule on my objection to that question, Your Honor.

THE COURT: Overruled.

MR. BURNES: Respectfully object.

MR. EDWARDS: No further questions.



DEFENDANT, EMMETT RAYMOND PROCELL, ON CROSS EXAMINATION BY ASSISTANT DISTRICT ATTORNEY EDWARDS - LOUISIANA SUPREME COURT RECORD PAGE 697 BEGINNING AT LINE 21 THROUGH PAGE 698 AT LINE 26.

Q Did you tell any of the officers or anyone else you talked to that day or for the next week that you were passing that gun around the table?

A No.

Q Did you tell anybody there and I'm not suggesting --

MR. BURNES: Same objection I made earlier about commenting on failing to make statements to officers. I want to renew and make again.

THE COURT: Overrule the objection.

MR. BURNES: I respectfully make a note of the assignment, Your Honor.

MR. EDWARDS: (Continuing)

Q Mr. Procell, I am not suggesting that there is any connection between the two, but you said you sent for Camille Gravel and that Mr. Burnes responded; he is in Mr. Gravel's firm; about ten (10) days or two (2) weeks after this event occurred. Between the time the incident occurred and the time that you first talked to Mr. Burnes, had you told anybody that you all were passing that gun around the table?

A Not to my recollection, no.

Q Or that the thing just accidentally discharged. Had you told anybody that?

A That gun don't accidentally discharge. You've got to have pressure on that trigger like I told you before.

MR. EDWARDS: Mr. Procell, I agree with you 100%, and I have no further questions.

MR. BURNES: That's all. Step down.

(WITNESS EXCUSED)



LOUISIANA SUPREME COURT RECORD PAGES 702-704 AS FOLLOWS:

JAMILL SLIMAN

called as a witness by the State, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE ASSISTANT DISTRICT ATTORNEY:

Q What is your name, please, sir?

A Jamill Sliman.

Q Mr. Sliman, do you know the defendant in this case, Emmett Raymond Procell?

A Yes, sir.

Q Is that he sitting here at the table by Mr. Burnes?

A Yes, sir.

Q I want to call your attention to a day in December of last year, either the night of the 16th or the morning of the 17th. Did you have occasion to see Mr. Procell -- occasion?

A Yes, sir.

Q Where did you first see him and at what time?

A Oh, it was sometime after 12:00 midnight, downstairs.

Q When you say downstairs, do you mean downstairs in the

Sheriff?s Office here in this courthouse?

A Yes, sir.

Q Was that after the incident that had occurred up at the lounge?

A Yes, sir.

Q He was being incarcerated at that time?

A Yes, sir.

Q Did you talk to him at that time?

A No, sir.

Q Did you see him later that same day?

A Yes, sir.

Q Where did you see him at that time?

A Saw him upstairs.

q When you say upstairs, do you mean you went up in jail to visit him?

A Yes, sir.

Q Are you a friend of his?

A Yes, sir.

Q Close personal friends?



A Well, he was my boss.

Q And you went up and talked to him?

A Yes, sir.

Q Did he tell you anything about how this incident had happened?

A No, sir, I never asked him.

Q Did he mention anything about it being an accident?

A No, sir, I didn't ask him.

Q But did he mention it to you?

A No, sir.

MR. EDWARDS: I have no further questions.

MR. BURNES: No questions.

(WITNESS EXCUSED)

MR. BURNES: May I approach the Bench on this matter, Your Honor? Will you all come forward, please?

(All attorneys at the Bench but not within the hearing of the jury)

MR. BURNES: Your Honor, it is the same point that I urged before. It is not merely a happenstance. They are just asking everybody he talked to if he made any statements.

MR. EDWARDS: I think it is important. If I didn't we wouldn't do it.

MR. BURNES: It is not rebuttal or anything.

MR. EDWARDS: Well, it is in that he says that it was an accident and he didn't say that immediately after the thing happened. I'll tell you this, Richard. That's the only witness I am going to put on in rebuttal on that particular point.

THE COURT: How many are you going to use?

MR. EDWARDS: Three (3) or four (4) but none of them will testify on that particular point. It will be short, just like that one was.

MR. BURNES: Would I have to make the same motion?

THE COURT: Go ahead.

MR. BURNES: Your Honor, I just make the same motion that I did earlier about a mistrial. Same motion and same ruling, I presume?

THE COURT: Yes. Same ruling. The Motion for a Mistrial is overruled.

MR. BURNES: I would like the State not to present any more witnesses that are not actually rebuttal. I respectfully object to the Court's ruling and assign error.

THE COURT: All right.